Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Qwest Communications International, Inc.	)	**WC Docket No. 02-148**
	)	
	)	
Consolidated Application for Authority To Provide In-Region, InterLATA Services in Colorado, Idaho, Iowa, Nebraska And North Dakota	)	

COMMENTS OF TOUCH AMERICA, INC.

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COMMENTS OF TOUCH AMERICA, INC.

Pursuant to the Commission's August 21, 2002 Public Notice in the above-referenced proceeding, Touch America, Inc. ("Touch America") hereby comments on the recent proposal of Qwest Communications International, Inc. ("Qwest") regarding the unfiled agreements between Qwest and competitive local exchange carriers ("CLECs"),[1] which is not only completely inadequate, but is a reminder of how Qwest suborned the comments of interested parties and obstructed the deliberate processes of the Communications Act and the Commission by entering into discriminatory agreements that it attempted to hide from public view. For these reasons alone, the Applications must be denied.

I. INTRODUCTION AND SUMMARY

Since the time that its secret agreements with CLECs were brought to light, Qwest has offered several proposals in an effort to do "just enough" to get its 271 Applications approved,[2]

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[1] *See* letter dated August 20, 2002 from Melissa E. Newman, Vice-President-Federal Regulatory, Qwest, to Marlene H. Dortch ("Qwest's proposal").

[2] Consolidated Applications of Qwest Communications International, Inc. for authority to provide in-region, interLATA service in the States of Colorado, Idaho, Iowa, Nebraska and North Dakota (WC Docket 02-148) and the States of Montana, Utah, Washington and Wyoming (WC Docket 02-189, and

while still defying its statutory and regulatory obligations. First, after the secret agreements were revealed by the Minnesota Department of Commerce, Qwest adopted a new policy for reviewing all new agreements with CLECs and filing all such agreements "that create obligations to meet the requirements of Section 251(b) or (c) on a going forward basis."[3] When that proposal was dismissed out of hand as inadequate, Qwest then proposed to post on its Web site all contracts with CLECS in states where it had Section 271 applications pending "insofar as those contracts contained effective going forward obligations related to Section 251(b) or (c)" and to "make available such going forward terms to other CLECs under the same policies that apply under Section 252(i)."[4] Realizing that these offers were still wholly insufficient, Qwest has now put on the table its apparent "final offer" in a last-ditch effort to squeak through the regulatory process. For those states in which it has a 271 application pending, Qwest proposes to hi-light those provisions in agreements that create on-going obligations "which Qwest believes relate to Section 251(b) or (c) services," file the agreements with the state commissions for approval of those provisions[5] and make them available under Section 252(i).[6] The proposal does not include, among other things, agreements that have been terminated or superseded by agreement, commission order or otherwise, and the Section 252(i) obligations will not apply to provisions

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collectively "Applications").

[3] *See* Qwest's proposal at 1.

[4] *Id*. at 2 (citing Qwest Reply Comments, WC Docket No. 02-148 at 131-32).

[5] Qwest states that it is not asking the state commissions to decide whether any of the contracts, or specific provisions therein, in fact are required to be filed under Section 252 as a matter of law, but only to approve the "hi-lighted" provisions under their Section 252(e) procedures. Qwest's proposal at 3.

[6] *Id*. at 2-3. Although Qwest states in certain instances that the Section 251(b) or (c) provisions would be made available pursuant to Section 251(i), Touch America assumes that Qwest intended to make them available under Section 252(i).

that settle past carrier-specific disputes, do not relate to Section 251, or that are no longer in effect.[7]

In its proposal, Qwest merely agrees to do what it should have been doing all along by statute – namely, filing agreements related to sections 251(b) and (c) of the Telecommunications Act of 1996 (the "Act") with state regulatory commissions for approval and making the terms of such agreements available to other CLECs pursuant to section 252(i) of the Act.[8] While compliance with the law is certainly a step in the right direction for Qwest, it clearly fails to remedy the otherwise blatant deficiencies in the record caused by its past conduct. Because Qwest's proposal only applies on a "going-forward" basis for agreements with "on-going obligations", Qwest's proposal does nothing to cure the effects of the agreements that Qwest entered into with CLECs, many of which have terminated or expired, that provided preferential terms to certain CLECs and silenced its would-be critics from participating in the 271 proceedings, on the record in this proceeding. Qwest's *past* conduct has rendered the record in this proceeding and the data relied upon by Qwest therein wholly deficient and unreliable. Qwest's proposal also violates the Commission's "complete when filed" policy and should therefore be deemed irrelevant in this proceeding.

Moreover, Qwest's proposal should be rejected to the extent that it only applies to states in which Qwest has a 271 application pending with the Commission and leaves solely to Qwest's

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[7] *Id.* at 3.

[8] In its proposal, Qwest agrees to post on its website and file with the state regulatory commissions for approval, agreements that contain effective going forward obligations "that relate to Section 251(b) or (c)." Section 252(a) of the Act provides that "[u]pon receiving a request for interconnection, services or network elements pursuant to section 251," the parties shall negotiate and enter into a binding agreement and submit that agreement to the state commission pursuant to Section 252(e) of the Act. *See* 47 U.S.C. § 252(a). As such, to the extent the agreements "relate to section 251(b) or (c)", they should have been filed with the state commissions. Qwest's proposal is therefore nothing more than an agreement by Qwest – when pushed to the wall – to comply with its statutory obligations.

discretion the determination as to which agreements are subject to section 252(e) and (i). Qwest may be commended for finally agreeing to comply with the law and its obligations to its competitors – at least with respect to certain states and subject to Qwest's conditions – but its Applications must still be denied.

II. ARGUMENT

A. Qwest's proposal does nothing to remedy the deficiencies in the record in this 271 proceeding.

Qwest's proposal only applies to those agreements that contain "effective going forward obligations related to Section 251(b) and (c)" and which have not been terminated or superseded by agreement, commission order or otherwise.[9] As such, the proposal does nothing to correct the deficiencies in the 271 record related to those agreements that silenced competitors, or the fact that Qwest discriminated in favor of certain carriers and against others in such agreements with respect to its Section 251 obligations, thereby skewing the data relied upon in the proceeding. The fact remains that the record is deficient, the data is unreliable and the Applications must be denied.

Incomplete Record

It is now beyond dispute that Qwest entered into agreements with CLECs in which Qwest made certain promises to the CLEC related to Qwest's section 251 obligations and, in return, the CLEC agreed to abstain from participating in Qwest's 271 proceedings.[10] As AT&T notes, at

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[9] *Id*. at 1-3.

[10] *See, e.g.,* Comments of McLeodUSA Telecommunications Services, Inc. at 2 (filed Aug. 1, 2002) ("[a]s has been disclosed in various regulatory proceedings, McLeodUSA is a also a party to an oral agreement with Qwest, in which McLeodUSA agreed to remain neutral on (neither support nor oppose) Qwest's 271 applications as long as Qwest was in compliance with all our agreements and with all applicable statutes and regulations"). See also, Comments of AT&T Corp. at 27 (filed Aug. 1, 2002) (Eschelon has confirmed that it was prevented by its secret agreement with Qwest from providing

the time these deals were struck, Qwest's secret partners were "among the most active in providing services in Qwest's region, were uniquely positioned to identify particular problems, and were quite unhappy with Qwest's services."[11] In fact, it was presumably the abysmal service that the CLEC was getting from Qwest that ultimately drove the CLEC to enter into the agreement with Qwest. Nevertheless, in buying the CLECs' silence, Qwest prevented the CLECs from airing their grievances in the 271 proceedings, thereby creating a huge hole in the record of those proceedings. Qwest's proposal to make "effective going forward obligations related to Section 251(b) and (c)" available to CLECs does nothing to remedy these defects and, therefore, for the reasons set forth in the Touch America's comments in this proceeding, the Applications must be denied.

Unreliable Data

Similarly, Qwest's proposal in no way cures the fact that Qwest's past actions to provide preferential treatment to certain carriers skewed the data of the third party testing process inasmuch as it incorporated the data of those preferred carriers. Over the past several years, Qwest entered into agreements with its competitors that provided certain CLECs with advantageous terms related to Qwest's obligations under Sections 251(b) and (c) of the Act. For instance, some agreements promised certain carriers a better quality of service, others made available better rates and provisioning intervals, and others offered otherwise unavailable expedited dispute resolution procedures. In at least one agreement, Qwest agreed to provide a particular CLEC an "on-site dedicated provisioning team for up to one year [consisting of] a

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evidence regarding Qwest's failure to comply with the Act in section 271 proceedings).

[11] *See* letter dated August 22, 2002, from James W. Cicconi, AT&T, to Chairman Michael Powell at 2.

coach and service delivery coordinator . . . to resolve and work through provisioning issues."[12] Provisioning its services is the lifeblood of a CLEC and there is arguably nothing closer to the heart of Section 251 than the ability to obtain the services it needs from Qwest. This agreement therefore clearly discriminated in favor of one CLEC and against others in a material way in violation of Section 251 and 252 of the Act.[13] Because the testing process included the data of this CLEC and other CLECs with more advantageous performance results, the data relied upon by Qwest to support its Applications are skewed and unreliable. The fact that some of these agreements may have been terminated or expired has no bearing on this finding and Qwest's proposal does nothing to correct the record in this proceeding. As the record is deficient and unreliable, Qwest's Applications must be denied.

B. Qwest's proposal violates the Commission's "complete as filed" rule.

Qwest's 11th hour proposal establishes that its Applications violate the Commission's "complete-as-filed" rule. The Commission has made clear that "a BOC's section 271 application must be complete on the day it is filed."[14] "[A]n applicant may not, at any time during the pendency of its application, supplement its application by submitting new factual evidence that is not directly responsive to arguments raised by parties commenting on its application," and even

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12 *See* letter dated August 16, 2002 from Mark D. Schneider, Sidley Austin Brown & Wood LLP to Marlene Dortch at 8.

13 *See* 47 U.S.C. §§251(2)-(4) and (6); 47 U.S.C. §252(e)(2)(A)(i). *See Qwest Corporation, Order Making Tentative Findings, Giving Notice for Purposes of Civil Penalties, and Granting Opportunity to Request Rehearing*, Docket No. FCU-02-2 at 10-15 (May 29, 2002) (finding that the agreements are discriminatory because they grant preferential rates, terms and conditions to a CLEC that would have been of interest to other CLECs negotiating with U S WEST); *In the Matter of Qwest Corporation's Compliance with Section 252(e) of the Telecommunications Act of 1996*, Docket No. RT-00000F-02-0271, Staff Report and Recommendation at 15-16 (finding that the unfiled agreements are discriminatory in that they give favored treatment to one carrier while denying it to another).

14 *Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan*, Memorandum Opinion and Order, 12 FCC Rcd. 20543, ¶ 50 (1997).

then, the applicant's right to "submit new factual information after its application has been filed is narrowly circumscribed."[15] Moreover, an applicant may only "challenge a commenter's version of certain events by presenting its own version of those same events," and "under no circumstance ... [may] counter any arguments with new factual evidence post-dating the filing of comments."[16]

Qwest's proposal seeks to do precisely what the rule is designed to prevent. By taking the actions described in its proposal (*i.e.*, disclosing terms and conditions of its secret agreements and by offering to file such agreements with state commissions and make them available to competitors), Qwest is attempting to respond to the arguments and concerns of commenters regarding the discriminatory affect of Qwest's secret deals, including the Department of Justice,[17] by presenting "new factual evidence" to rebut these serious concerns a mere 21 days before the Commission must render its decision.

The Commission, of course, may, and in fact, has, waived the complete-as-filed requirement in the past.[18] However, "[a]n applicant for wavier faces a high hurdle even at the starting gate."[19] The circumstances here do not justify a deviation from the complete-as-filed requirement. On the contrary, they demand it be applied in full force and effect. Qwest elected to engage in a self-serving interpretation of its statutory duty to file and seek approval of all interconnection agreements under Section 252 – a duty understood and adhered to by all other

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15 *Id.* at ¶¶ 50-51.

16 *Id.* at ¶ 50.

17 Department of Justice Evaluation at 3 (allegations of discrimination "are serious and deserve the Commission's careful attention").

18 *See e.g., Application by SBC Communications, Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance for Provision of In-Region, InterLATA Service in Kansas and Oklahoma*, Memorandum Opinion and Order, 16 FCC Rcd 6237 ("SBC Kansas/Oklahoma Order"). Qwest has not asked for a waiver.

19 *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969).

industry participants. Qwest chose not to follow this path because it did not serve its needs. Instead, Qwest elected to enter into patently discriminatory interconnection arrangements with competitors, who also tended to be vocal critics, in exchange for their vows of silence in its 271 proceedings. Its scheme to corrupt the 271 process now brought to light, Qwest had little choice but to "come clean." But doing so, particularly at this late stage in the regulatory process, cannot shelter Qwest from the application of the complete-as-filed rule. Indeed, earlier waivers were not used to excuse misconduct and duplicity such as involved here. Rather, such waivers have been granted, in part, as a form of positive reinforcement to the BOCs "for responding to criticism in the record concerning ... rate levels by making pro-competitive rate reductions."[20] A waiver here would only serve to reinforce Qwest's continued abuse of Commission processes and disregard for its 271 obligations.

C. Qwest's proposal should be rejected as it leaves too much to Qwest's discretion and only applies in states where Qwest has Section 271 applications pending.

Unfettered Discretion

In its proposal, Qwest is charged with determining which agreements, or portions thereof, will be filed with the state commissions for approval and made available to other CLECs. History has shown that leaving these types of decisions in the hands of Qwest – akin to leaving the fox in charge of the hen house – opens the door for much mischief. A backstop is needed to ensure that Qwest is properly conducting these activities and that permit the state commissions, on an independent basis, to ascertain whether other agreements, or portions thereof, should be subject to sections 252(e) and (i).

[20] SBC Kansas/Oklahoma Order at ¶25.

For instance, with respect to new agreements, Qwest offers to establish a six-person team charged with reviewing every contract that Qwest enters into to determine whether to file it under Section 252.[21] Further, for "old" agreements that have not been terminated, Qwest will mark, highlight or bracket those terms and provisions "which Qwest believes relate to Section 251(b) or (c) services," and file the agreements with the state commissions for approval of the applicable provisions.[22] Qwest provides no guidance as to the standards or principles it will employ to determine which of the new agreements should be filed pursuant to section 252(e) or which provisions of the old agreements relate to sections 251(b) or (c). Indeed, Qwest has already exercised its right to certain "carve outs" that would not be included within its 251/252 obligations.[23]

The record has shown that Qwest clearly has a different opinion of the scope of its 251 and 252 obligations than all other participants in the industry. Accordingly, placing Qwest in charge of these determinations is fraught with the possibility of repeating history, particularly after Qwest has obtained 271 authority. At a minimum, the Commission must make clear that each state commission has independent authority to inquire of Qwest about its agreements with CLECs, and the terms and conditions thereof, and to require Qwest to promptly respond to such inquiries in a complete and forthright manner, subject to penalty. In addition, the Commission should consider requiring Qwest to certify on a quarterly basis, without compromising confidentiality, the agreements that it has entered into with CLECs, the general nature of the

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21 Qwest proposal at 1.

22 *Id*. at 2-3.

23 In its proposal, Qwest states that it is not filing for state commission approval day-to-day paperwork, settlements of past disputes, stipulations or agreements executed in connection with federal bankruptcy proceedings or orders for specific services. *Id*. at 3. Moreover, Qwest will be redacting those contract terms "that relate solely to the specific CLEC and do not create on going obligations," such as confidential settlement amounts. *Id*.

agreements and whether the agreements have been filed with the appropriate state commission and made available to other competitors.

Restricted to 271 states

Moreover, Qwest's proposal inexplicably only applies to those states where Qwest has an application pending for 271 authority.[24] Qwest's obligations under Section 252 of the Act have no relation to – and are certainly not triggered by – the filing of an application under Section 271 of the Act. Qwest is merely making transparent the true motive of its proposal – to do "just enough" to get 271 approval – while intending to continue to otherwise brush off its obligations. Qwest's proposal should be implemented throughout Qwest's region, regardless of the status of its 271 applications. Indeed, in an effort to minimize the number of its secret agreements, Qwest has asserted that many of the agreements are region-wide agreements.[25] Despite this, Qwest does not propose a region-wide solution, but only proposes to file its agreements in those states where it has pending 271 applications.

Accordingly, to the extent that Qwest's proposal is accepted by the Commission, it should be applied throughout Qwest's region and modified to ensure that Qwest is not permitted to unilaterally game the system once again to the detriment of its competitors.

III. CONCLUSION

Qwest's proposal fails in many respects. Qwest is merely offering to file agreements that should have been filed in the first place. Even so, the proposal does not cure the defects of the record in this docket caused by the inaccurate and missing data from those carriers that were silenced by Qwest's discriminatory treatment. The Commission cannot turn a blind eye to

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24 *Id*. at 2-3.

25 *See* letter dated August 13, 2002 from Peter A. Rohrbach, Counsel for Qwest Communications

Qwest's conduct – particularly as the evidence against Qwest continues to mount. In other words, Qwest's proposal is indicative of its conduct throughout this proceeding and the history on which this proceeding is based. The Commission is compelled, therefore, to deny the Applications.

Respectfully submitted,

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August 28, 2002

International Inc. to Marlene Dortch at 2-3.

CERTIFICATE OF SERVICE

I, Jane L. Hall, do hereby certify that on this 28th day of August, 2002, a copy of the foregoing Comments filed on behalf of Touch America, in Docket No. 02-148, was served by U.S. Mail, postage prepaid, to the parties on the attached service list.

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